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THE BALANCED BUDGET AMENDMENT AND A SUMMARY OF ARTICLE V CONVENTIONS

by

**Jeffrey Mann
Legislative Analyst**

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Ellen Jeffries, Director
Senate Fiscal Agency
P.O. Box 30036
Lansing, Michigan 48909-7536
Telephone (517) 373-2767
www.senate.michigan.gov/sfa

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INTRODUCTION

Proposals to balance the Federal budget have taken many forms over the nation's history. One noteworthy proposal is an effort to amend the United States Constitution to require a balanced budget, the so-called "balanced budget amendment" or "BBA". While the idea of a BBA is not novel, the notion of calling a convention of the states has been gaining support in recent years, and recently was the subject of a joint resolution adopted by the Michigan Legislature.¹ Because efforts to adopt a BBA involve the often tried, but rarely successful pathways of amending the U.S. Constitution, this paper first introduces those amendment pathways. A brief history of the Federal budget, legislative action, and BBA proposals follows. The paper then outlines key issues faced by Article V conventions, the various issues a BBA might address, and the most common arguments advanced in favor of, and against, a BBA.

AMENDING THE U.S. CONSTITUTION

The Framers of the Constitution crafted a deliberately difficult method for amending the Constitution. Their aim was to balance the need for government that can change with the times, with the benefits of prudence, deliberation, and national self-reflection. To illustrate the difficulty of amending the Constitution, between 1789 and January 2, 2013, there were approximately 11,539 proposals to amend the Constitution.² Of these, 33 made it past the congressional approval threshold.³ Six of these 33 failed, and 10 were adopted in the Bill of Rights, while the remaining 17 were adopted over time.⁴ Article V of the U.S. Constitution provides two different pathways to propose an amendment and two different ways to ratify an amendment for a total of four different methods to amend the Constitution. The multiple pathways act as a check on the power of the Federal government by the states.

The first and most often used method of proposing amendments starts with Congress. An amendment is proposed in the form of a joint resolution. If the joint resolution passes with a two-thirds majority in both the House of Representatives and the Senate, the proposed amendment is first submitted to the National Archives and Records Administration's Office of the Federal Register, where legislative history information is included, and the whole package is published. The package then is submitted to the governor of each state.⁵ The President has no formal role in the amendment process and does not sign or approve the resolution. After receiving the proposed amendment, each governor formally submits it to his or her state's legislature or to a state convention convened for the purpose of ratifying or rejecting the amendment. Once a state ratifies an amendment, a certified copy of the state's action is submitted to the Federal government, where it is checked for legal sufficiency and maintained in custody until the

¹ Senate Joint Resolution V, Regular Session of 2014. Available on MI Legislature website: <http://www.legislature.mi.gov>.

² "Measures Proposed to Amend the Constitution", United States Senate, retrieved 7-15-2014 at: https://www.senate.gov/pagelayout/reference/three_column_table/measures_proposed_to_amend_constitution.htm. The Senate indicates that the number is approximate, because there are certainly duplications in the proposed amendments, inadequate indexing in the early years of Congress, and inclusion of amendments in the nature of a substitute.

³ Thomas H. Neale, "The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress", p. 3, *CRS Report*, 4-11-2014.

⁴ *Id.*

⁵ "The Constitutional Amendment Process", National Archives and Records Administration, retrieved 6-22-2014 at: <http://www.archives.gov/federal-register/constitution/>.

amendment is adopted or fails.⁶ Once three-quarters, or 38, of the states have ratified the amendment, the amendment is adopted and becomes part of the Constitution. Of the 27 amendments that have been adopted, all were proposed and approved by Congress, and all but the Twenty-First Amendment were approved by state legislatures; the Twenty-First Amendment (which repealed Prohibition) was ratified by state conventions.⁷

The second process to amend the Constitution is through an Article V convention. An Article V convention is called upon application of the legislatures of two-thirds of the states to Congress. Once the requisite number of applications has been received, Congress is obliged to call the convention. After being proposed by the convention, an amendment or amendments must be ratified by three-quarters of the state legislatures or their conventions. None of the 27 amendments to the U.S. Constitution was proposed in this manner; however, there is ample historical evidence to support the proposition that all of the amendment pathways are equally valid.⁸

HISTORY OF THE BALANCED BUDGET

The discussion of the role of government in maintaining or paying off national debt has its roots in the founding of the Union. To put it another way, the United States has, with few exceptions, always had national debt. As the Articles of Confederation did, the Constitution gives Congress the power to borrow money on the credit of the United States.⁹ The very first obligation borne by the Federal government arose out of the Revolutionary War. The United States Department of Treasury has estimated that public debt for the Revolutionary War reached over \$75.4 million by 1791.¹⁰ With the power to borrow money came concern about using that power injudiciously. In the waning years of the 18th Century, Thomas Jefferson expressed reservations about the power of Congress to borrow money and suggested that an amendment be adopted to end the ability of Congress to issue debt.¹¹ Ultimately, this did not happen and the national debt would increase over the next 45 years until paid off during the presidency of Andrew Jackson when the assets of the Second Bank of the United States were liquidated.¹² Soon after, however, the national debt began to increase again.

The issuance of public debt was further addressed by the adoption of the Fourteenth Amendment, which, in part, legitimizes public debt appropriated by Congress.¹³ The public debt

⁶ *Id.*

⁷ See n. 3, at 2.

⁸ See Thomas H. Neale, "The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress", p. 6-8, *CRS Report*, 7-10-2012.

⁹ Articles of Confederation and Perpetual Union, Art. IX; U.S. Const., Art. I, § 8, cl. 2.

¹⁰ "Our History", Bureau of the Public Debt, United States Department of the Treasury, retrieved 7-10-2014, at: <http://www.publicdebt.treas.gov/history/history.htm>.

¹¹ There are several quotes attributable to Thomas Jefferson on this subject, including the following: "I wish it were possible to obtain a single amendment to our Constitution. I would be willing to depend on that alone for the reduction of the administration of our government to the genuine principles of its Constitution; I mean an additional article, taking from the federal government the power of borrowing." "Letter to John Taylor of Caroline, November 26, 1798", *The Writings of Thomas Jefferson*, Vol. X, 1903.

¹² "The 19th Century", Bureau of the Public Debt, United States Department of the Treasury, retrieved 7-10-2014 at: <http://www.publicdebt.treas.gov/history/1800.htm>.

¹³ Specifically, U.S. Const., amend. XIV, § 4 provides, "The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned."

increased significantly, from \$64.8 million to \$2.7 billion, because of the Civil War.¹⁴ Immediately after the war, the amount of public debt decreased but this trajectory would not remain in place for long. Soon after the war, the national debt began to increase and continued to increase throughout the rest of the 19th and into the 20th Century.¹⁵ As the primacy of balanced budgets gave way to a larger national debt, the interest in legal changes to require fiscal restraint increased.

One of the first attempts to formally balance the Federal budget began in 1935 with Senator Millard Tyding's introduction of Senate Joint Resolution 36. The resolution sought to prohibit appropriations in excess of revenue if there was not a new debt authorization, and would have required the liquidation of new debt over 15 years.¹⁶ The measure was unsuccessful. The following year, Representative Harold Knutson introduced House Joint Resolution 579. That measure was the first proposed constitutional amendment to require a balanced budget. House Joint Resolution 579 would have established a *per capita* limitation on public debt, but would have still allowed for some deficit spending.¹⁷ Another proposed BBA was jointly referred to the Senate Appropriations Committee and the Senate Judiciary Committee in 1947, but no further action was taken.¹⁸

In the mid-1970s through 1983, interest groups like the National Taxpayers Union and the National Tax Limitation Committee petitioned state legislatures to apply to Congress to call a convention.¹⁹ Accordingly, states began to pass resolutions requesting a convention to propose a BBA. At the movement's zenith in 1983, 32 of the 34 states required to call a convention had done so.²⁰ By 1985, however, two states had rescinded their applications. Their rescission, combined with fears of a "runaway" convention and the passage of the Balanced Budget and Emergency Deficit Control Act dampened the momentum of the movement.²¹ Meanwhile, Congress continued to move toward balancing the budget through statutory means. In the mid-1980s through the early 1990s, Congress passed at least three different laws pertaining to the balancing of the Federal budget, including the Balanced Budget and Emergency Deficit Control Act.²² Ultimately, these measures were ineffective.

Between the 97th and 105th Congresses, there were nine joint resolutions reported out of the Senate Committee on Judiciary and 23 days of testimony heard on the idea of a BBA. The House considered similar joint resolutions on seven separate occasions during the same period.²³ In the mid-1990s, further efforts in Congress culminated in a nearly successful proposed BBA. In 1995, the 104th Congress included a BBA proposal, House Joint Resolution 1, as part of its "Contract With America". The resolution passed the House by a vote of 300-132,

¹⁴ See n.12.

¹⁵ By 1940, the national debt had grown to approximately \$50.0 billion. See "Our History", n. 10. This increase was largely due to financing World War I, stimulus efforts during the Great Depression, and the buildup of military forces at the outset of United States' action in World War II.

¹⁶ James V. Saturno & Megan S. Lynch, "A Balanced Budget Constitutional Amendment: Background and Congressional Options", p. 2, *CRS Report*, 8-3-2011.

¹⁷ H.J. Res. 579, 74th Congress; n. 16, at 2.

¹⁸ See n. 16, at 2-3.

¹⁹ See n. 8, at 12 & n. 16, at 24.

²⁰ See n. 16, at 25.

²¹ *Id.*

²² *Id.*

²³ See n.16, at 13.

making it the first proposed BBA ever to pass the House.²⁴ It failed in the Senate by a 65-34 vote, one vote short of passage.²⁵ Throughout and after the 104th Congress, proposed BBAs have been introduced. None were successful, however, and until recently, the popularity of a BBA decreased. In 2011, the House passed the Cut, Cap, and Balance Act, which would have allowed the Secretary of the Treasury to exercise additional borrowing authority, i.e., raise the debt ceiling, if Congress approved one of three joint resolutions pertaining to a BBA or a similar amendment.²⁶ After negotiations between the President and Congress, the Budget Control Act of 2011 was enacted instead.²⁷ That law required Congress to vote on the passage of a joint resolution proposing a BBA between September and December 2011. Two proposed BBAs were introduced in the Senate and one was introduced in the House.²⁸ All three were rejected.

Currently, the national debt stands at nearly \$17.6 trillion.²⁹ Approximately \$12.5 trillion is debt held by the public in both marketable and nonmarketable securities. The remainder is in intragovernmental holdings.³⁰

ISSUES WITH THE ARTICLE V CONVENTION AMENDMENT PROCESS

Since none of the 27 amendments to the Constitution was proposed by a convention of the states, there are more questions than answers as to how this process would work in practice. The Constitution is silent on matters of operation, stating only, "The Congress...on the Application of the Legislature of two thirds of the several States, shall call a Convention for proposing Amendments...".³¹ Many questions remain as to how delegates would be appointed and what enforcement mechanism would be used if the correct number of applications was received but Congress failed to call a convention.³²

²⁴ Ernest J. Istook, Jr., "Considering a Balanced Budget Amendment: Lessons from History", p. 3, *Background* No. 2581, (The Heritage Foundation), 7-14-2011.

²⁵ See n. 16, at 22.

²⁶ H.R. 2560, 104th Congress. The three joint resolutions were S.J.Res. 10, H.J.Res. 1, and H.J.Res. 56. These resolutions, and all joint resolutions dating back to the 93rd Congress, are available at the U.S. Congress website, www.congress.gov.

²⁷ See n. 16, at 24.

²⁸ Ashley Southall, "Balanced Budget Amendments Fall Short in the Senate", *The New York Times: The Caucus*, 12-14-2011, retrieved 7-28-2014 at: <http://thecaucus.blogs.nytimes.com/2011/12/14/balanced-budget-amendments-fall-short-in-the-senate/>.

²⁹ Monthly Statement, Public Debt of the United States, 6-30-2014: http://www.treasurydirect.gov/govt/reports/pd/mspd/2014/2014_jun.htm.

³⁰ *Id.* Marketable securities consist of bills, notes, bonds, and Treasury Inflation-Protected Securities. These securities are negotiable and can be transferred or sold on the secondary market. Nonmarketable securities consist of U.S. Savings Bonds, Government Account Series securities, and other similar securities. Intragovernmental holdings are "Government Account Series securities held by Government trust funds, revolving funds, and special funds; and Federal Financing Bank securities". "FAQ about the Public Debt": http://www.treasurydirect.gov/govt/resources/faq/faq_publicdebt.htm#DebtMakeup.

³¹ U.S. Const., Art. V.

³² The text of the U.S. Constitution is clear in that it specifies that if the Legislatures of two-thirds of the states apply for a convention, Congress must call a convention. However, if Congress fails to do so, the question becomes who would have standing to challenge Congress's lack of action. Standing is discussed throughout this paper, as it will be a persistent obstacle to those wishing to assert a claim under a BBA. Generally, the determination of whether a party has standing to bring a claim in Federal court involves a three-prong test, as follows: 1) has the party suffered an injury in fact, in other words, a concrete and particularized, actual or imminent invasion of a legally protected interest, 2) is the injury fairly traceable to the challenged action of the defendant, rather than the result of a third party's actions, and 3) is it likely that the injury will be redressed by a favorable decision by the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Standing is not usually found if a party is asserting a third party's claims, or if the party suffers from a generalized grievance that many others suffer from, e.g., taxpayer standing.

Another issue of immediate importance to the BBA initiatives in progress is whether an application by a state's legislature can be rescinded. In the 1970s, states began to pass resolutions requesting a constitutional convention to propose a BBA. As noted above, by 1983, 32 of the 34 states needed to compel Congress to call a convention had applied. However, beginning in 1985, 17 states passed resolutions that rescinded their applications.³³ To complicate matters, since 2010, five of the states that rescinded their applications have submitted new applications. In addition, Ohio, Michigan, and Louisiana have adopted resolutions within the past year.³⁴ With the passage of Louisiana's resolution, 35 states, including those that have rescinded their applications, have applied to Congress for a convention. This is one more than the number needed before Congress is required to call for a convention. However, if states are capable of rescinding an application, then only 24 applications are pending. The question of whether a state can rescind an application is an open one, as the Constitution is silent on that matter, and no court has ruled one way or the other.

Another significant issue to be addressed is whether an Article V convention may be called for the general purpose of proposing amendments, or if the convention must be called for a limited purpose. The possibility of calling a "limited" convention that morphs into a "general" convention gives rise to fears of a "runaway" convention that could set about rewriting the Constitution.³⁵ Apart from the validity of those concerns, it is important whether a convention can be limited or general. Advocates of a general convention argue that the language specifying that Congress "shall call a Convention for the purpose of proposing Amendments..." precludes limited conventions and specifies no limit on the subject matter of an Article V convention.³⁶ Supporters of this approach contend that the chief benefit of a general convention is the creation of a deliberative body that is free to pursue issues that need to be addressed, independent of Congress. Scholars who advance this theory differ on the extent of the Convention's powers,³⁷ but generally agree that the Constitution includes sufficient checks on an Article V convention that its power only to "propose" amendments will not become anything greater.

Defenders of the limited convention theory argue that the Framers did not envision a broad effort to rewrite the Constitution. Some scholars who share this viewpoint argue that conventions are not always general or specific, but could instead be tailored for specific needs.³⁸ In essence, the power to determine specificity would be in the hands of the states, as a check on the power of Congress. Others, including Congress as a body, have claimed that it is for Congress to act as a guardian on conventions. In its consideration of Article V conventions,

³³ See n.3, at 8.

³⁴ *Id.* at 6. Louisiana's concurrent resolution calling for an Article V convention was presented to the Louisiana Secretary of State on 5-27-2014.

³⁵ The fear of a "runaway" convention probably should not be a major concern for several reasons. First, those who believe that a convention could "run away" appear to assume that a convention would be made up of a single ideological viewpoint. Holding such a convention would almost certainly doom whatever amendment came out of it. In that regard, the convention itself would act like a check. At least a majority of the delegates at an Article V convention would have to approve of a proposed amendment. Even if the convention approved of a series of amendments that were quite expansive in scope, they would still require the approval of the legislatures or a convention in three-fourths of the states before the amendments were ratified. This process makes it unlikely that a "runaway" convention would be successful.

³⁶ See n. 3, at 21.

³⁷ *Id.* at 22.

³⁸ Thomas H. Neale, "The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress", p. 23, *CRS Report*, 4-11-2014.

Congress has suggested, though not legislated accordingly, that it has the power to determine the subjects to be considered at a convention.³⁹

A related matter is to what extent the states' applications must be the same to be considered part of the two-thirds needed to compel Congress to call a convention. Most scholars agree that applications need not share the same language to be counted; issue congruency would be satisfactory. Those who take this view advance several reasons in support of it. First, Article V does not require such specificity. Consequently, requiring states to submit identical applications would unduly restrict their right to require Congress to call a convention under Article V. A 1974 American Bar Association report and a 1993 House Judiciary Committee study concluded likewise and several Congresses have tried to pass legislation accordingly.⁴⁰ Not everyone shares the opinion that even issue congruency is required. The Friends of the Article V Convention (FOVC) contend that a petition to call a convention is an application to call a general convention, no matter what subject matter the application addresses.⁴¹ The FOVC points to the language of Article V as not providing any specificity requirement for calling a convention. Notwithstanding either of these views, many of the states that have adopted Article V convention applications have included language that requires the applications to be aggregated with other states' applications addressing the same issue.⁴²

A separate question is whether applications for a convention are valid indefinitely, or if they expire after a certain period of time. Many advocates of an Article V convention argue that applications for a convention are not time-barred and remain valid indefinitely. These groups draw on the adoption of the 27th Amendment as support for the idea that, unless specified otherwise, applications remain valid indefinitely.⁴³ Others argue for the proposition that applications should expire at some time certain, usually a term of two, four, or seven years. Proponents of a defined period of validity point to the authority of Congress to set a time limit on the ratification of amendments (which is typically seven years).⁴⁴

TYPICAL BBA PROPOSAL LANGUAGE AND ANALYSIS

A constitutional amendment is generally incapable of addressing every potential conflict or issue it will raise upon ratification. Many questions would likely remain unanswered if a BBA were adopted, even after enabling legislation was passed. Nevertheless, provisions of a BBA would have to address many of the issues presented below. In fact, many of these ideas have been addressed in at least one version of the proposed BBA language introduced either by joint resolution in Congress, or as language that could be proposed at in an Article V convention on a BBA.

³⁹ *Id.* at 24.

⁴⁰ See n.8, at 16-17.

⁴¹ *Id.* at 17.

⁴² "[T]his application is to be considered as covering the balanced budget amendment language of the presently outstanding balanced budget applications from other states...and this application shall be aggregated with those applications for the purpose of attaining the two-thirds of states necessary to require the calling of a convention for proposing a balanced budget amendment...". Michigan Senate Joint Resolution V, Reg. Sess. 2014.

⁴³ The 27th Amendment was proposed in 1789 and was ratified in 1992.

⁴⁴ See Thomas H. Neale, "The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress", p. 18, *CRS Report*, 7-10-2012.

The first item usually suggested is simple language that prohibits Congressional appropriations from exceeding total revenue for any fiscal year, or some similar provision. Some previously proposed measures have included language that would allow deficit spending with a majority or supermajority vote of both houses of Congress.⁴⁵ Presumably, any language adopted would maintain an absolute requirement that the budget be balanced at the end of a fiscal year. While the language itself is simple, the execution would be much more complex.⁴⁶ Because any budget for the fiscal year would necessarily be based on estimates, it is an open question what role estimates would play in formulating a budget. For instance, estimates could be used to gauge what money to outlay for a fiscal year with adjustments following mid-year or the next fiscal year and an absolute requirement that the budget be balanced. Estimates also could be used as the sole metric for determining compliance with the BBA.⁴⁷ In the former case, estimates become quite important since inaccuracy may result in large, unplanned adjustments, and could create incentives for opposing political branches to increase or decrease their receipts estimates based on their viewpoint on cutting spending.⁴⁸ The latter case could lead to situations in which deficits are created while the government is in compliance with the BBA. Other pertinent questions that would have to be answered either in a BBA itself, or in its enabling legislation, include: a) how would budget deficits resulting from inaccurate estimates be adjusted, if at all, and b) how would deficit spending have to be approved by a majority or supermajority (piecemeal, all at once, per agency or program, etc.).

Nearly all of the language that has been put forth includes an exception to the balanced budget provision for costs associated with a declared war, armed conflict, or a national emergency. The inclusion of armed conflict instead of declared war and the conditions for a waiver under these circumstances are a source of contention between advocates of a BBA. In the case of military action, proponents of a narrowly tailored BBA on this issue point to the amount of time that the United States has seen armed conflict over the last few decades and express concern that a BBA allowing an automatic waiver during an armed conflict would be used to justify large deficits annually.⁴⁹ At least one version of the language allows for an exception in the case of a declared war or an armed conflict, but increases the threshold necessary to waive the BBA in armed conflict situations from a majority to a supermajority, and requires the waiver to identify and be limited to specific outlays made necessary by the armed conflict.⁵⁰ The concerns between narrowly tailored language and broad language apply to other suggested waiver situations, like national emergencies. Additional circumstances have been suggested as being extreme enough to justify waiver of a BBA; these include, for example, recessions or elevated unemployment.⁵¹

⁴⁵ See, e.g., S.J.Res. 10, § 1, 112th Congress.

⁴⁶ See James V. Saturno & Megan S. Lynch, "A Balanced Budget Constitutional Amendment: Background and Congressional Options", p. 29-31, CRS Report, 8-3-2011, for a detailed explanation of the complexities of this particular issue.

⁴⁷ *Id.* at 29. At least one proposal would have allowed Congress to enforce the proposed amendment through legislation, which could have relied on estimates of receipts and outlays. H.J.Res. 336, § 5, 103rd Congress.

⁴⁸ See n. 46, at 30.

⁴⁹ Brian Darling, "The House and Senate Balanced Budget Amendments: Not All Balanced Budget Amendments Are Created Equal", p. 4-5, *Backgrounder* No. 2580, (The Heritage Foundation), 7-14-2011.

⁵⁰ *Id.* at 3.

⁵¹ H.J.Res. 336, § 2, 103rd Congress and H.Amdt.18 to H.J.Res.1, 104th Congress, respectively.

A category of language often featured in BBA proposals relates to taxation and spending. Some of the suggested versions of the BBA specifically make it more difficult to raise existing taxes or levy new taxes, and indirectly establish a preference for spending cuts.⁵² Other versions of the BBA refer to aggregate revenue, or another similar phrase.⁵³ Some of this language caps spending at a percentage of a particular economic indicator, usually the gross national product (GNP) or the gross domestic product (GDP).⁵⁴ Other language ties maximum spending growth to the percentage growth of the GNP, GDP, or some other indicator. In any case, a decision to increase spending (and corresponding taxation) generally involves a supermajority vote of the members elected to and serving in each house.

Another issue that arises from a provision to control revenue increases is how "revenue" is defined, if that term is used. As a term that appears in Origination Clause of the Constitution, the word "revenue" has been given a particular meaning in United States Supreme Court jurisprudence.⁵⁵ That is, bills that raise revenue are measures that raise funds to support government generally, not specific government programs.⁵⁶ A court reading the BBA in light of Origination Clause cases could construe the use of "revenue" in the BBA in the same manner, restricting the tax-limiting provisions of the BBA to those measures that raise funds for general government use, which would limit the effect of the BBA on capping revenue. In addition, the Federal government differentiates between "revenue", and "offsetting collections" and "offsetting receipts" (generally, offsets from outlays).⁵⁷ Because these income streams are treated differently in the budget process, it is not clear how a BBA would affect them if adopted. On the other hand, certain measures may be impermissible under a BBA if the measure reduces tax rates but increases the taxable base or volume of taxable activity such that revenue is increased.⁵⁸

Related to taxation and spending is the issue of a debt cap. The purpose of a cap on debt is to eliminate Congress's ability to run deficits by making it more challenging to increase the national debt through spending. The key to the effect of such a provision on the United States is what debt would be considered in such a debt cap. Some suggested language considers the gross public debt, that is, all Federal government debt including the debt held by Federal trust funds.⁵⁹ Other suggested provisions would limit increases only in certain categories of debt, e.g., debt held by the public, or debt subject to statutory limit. The terms used in the BBA language could have a significant impact on Social Security, or other programs that accumulate surpluses for

⁵² See, e.g., H.J.Res. 1, § 5, 112th Congress.

⁵³ See S.J.Res 10, § 4, 112th Congress.

⁵⁴ *Id.* at § 3.

⁵⁵ See n. 46, at 36-37 for its discussion of revenue and *United States v. Munoz-Flores*, 495 U.S. 385 (1990).

⁵⁶ "[A] statute that creates a particular governmental program and that raises revenue to support that program, as opposed to a statute that raises revenue to support government generally, is not a 'Bill[] for raising Revenue' within the meaning of the Origination Clause." *Munoz-Flores*, 495 U.S. 385, at 398.

⁵⁷ "Tax Topics: The Federal Budget", Tax Policy Center: <http://www.taxpolicycenter.org/taxtopics/budget/concepts.cfm#offcollect>. "Revenues" are "[f]unds collected from the public that arise from the government's exercise of its sovereign or governmental powers", e.g., income taxes, customs duties, and administrative fines. "Offsetting collections" and "offsetting receipts" are collections that are credited directly to expenditure accounts (for offsetting receipts, offsetting receipt accounts) and deducted from gross budget authority and outlays of the expenditure (or offsetting receipt) account, rather than added to receipts. The difference is that, for these funds, the government is engaged in market or business activities, e.g., collecting royalties or contract revenue.

⁵⁸ See n. 46, at 37. The authors also point out that with the right wording, a BBA could be interpreted such that any legislative measure that increases taxable economic activity, even indirectly, could be unconstitutional.

⁵⁹ See n. 46, at 35.

future use (and increase gross debt in the process). Requiring a supermajority vote to increase the gross public debt would require a supermajority vote to accommodate these programs on a yearly basis.⁶⁰ On the other hand, separating categories of debt from the BBA's language could mean separate ceilings for different types of debt. Another concern is that these debt caps also might be ineffective at restraining true deficit spending, as Congress could create financing schemes to comply with the letter of the BBA, but not the spirit of its provisions.⁶¹

Many of the ideas for a BBA also involve executive activity. The most prevalent approach includes a requirement that the President present a balanced budget.⁶² Currently, the President's role in the budget process is predominately based on statutory authority rather than constitutional authority. Budget bills are subject to the Presentment Clause and must be signed by the President, like any other legislation. However, the mechanics of the President's involvement in the budget-making process are specified in several statutes, particularly the Budget and Accounting Act.⁶³ An issue that has received some attention is whether vesting the executive branch with additional responsibilities in crafting a balanced budget would give the President greater powers to affect Federal spending, e.g., impoundment.⁶⁴ Some suggested language includes this power explicitly,⁶⁵ while other language leaves this issue unaddressed, which could lead to an implied power of the President to affect the budget.

A major concern of some proponents of the BBA is what is seen as unwarranted involvement of the judiciary in crafting a budget, or setting budgetary policy. An idea suggested in the 103rd Congress to remedy this was to prohibit a court from ordering remedies in a case or controversy arising under the BBA, with the exception of a declaratory judgment or another specific remedy authorized by enabling legislation.⁶⁶ Other provisions would directly place in the BBA's language specific limitations on what a court could do in the context of revenue increases.⁶⁷

ARGUMENTS OF BBA PROPONENTS AND OPPONENTS

Proponents of a BBA often argue that the fiscal health of the nation depends on paying down the national debt and generating a balanced budget. With a national debt of over \$17.0 trillion, they argue, it will become increasingly difficult to find buyers, domestically and abroad, of Federal debt, or those borrowers will demand higher interest rates. With government-issued debt securities at higher interest rates, proponents claim that consumer rates also will increase, which will raise the interest rates for business, home, and vehicles loans.⁶⁸ Additionally,

⁶⁰ Robert Greenstein & Richard Kogan, "A Constitutional Balanced Budget Amendment Threatens Great Economic Damage", p. 6, Center on Budget and Policy Priorities, 7-27-2011. See also n. 46, at 36.

⁶¹ See n. 46, at 36.

⁶² For example, see n. 49, at 3, 4.

⁶³ See, e.g., 31 U.S.C. § 1105(a).

⁶⁴ Impoundment is the power of an executive not to spend money that a legislature has appropriated. Most state governors have this power, and the President had this power until near simultaneous passage of the Congressional Budget and Impoundment Control Act and a dialing back of the pre-Act impoundment power by the Supreme Court in *Train v. City of New York*, 420 U.S. 35 (1975).

⁶⁵ See Section 4 of "The Balanced Budget Amendment", Compact for America: <http://www.compactforamerica.org/documents/>.

⁶⁶ See n. 46, at 39-40.

⁶⁷ An example proposed by Senator Mitch McConnell in 2011 included the following language: "No court of the United States or of any State shall order any increase in revenue to enforce this article." Darling, n. 49, at 2-3.

⁶⁸ Romina Boccia, "How the United States' High Debt Will Weaken the Economy and Hurt Americans", p. 5, *Backgrounder* No. 2768, (The Heritage Foundation), 2-12-2013.

proponents contend that, as the Federal government continues to borrow from entitlement trust funds, such as Social Security, the likelihood that these trust funds will be able to meet their obligations will be diminished to the point that promised benefits will not materialize and those funds will be unable to lend additional money.⁶⁹ Furthermore, other methods that the government could use to continue spending might include expanding the money supply, which could cause inflation and a corresponding rise in prices for consumers.⁷⁰ Arguably, by limiting the growth of the debt, or even requiring Congress to reserve money to pay down the debt, a BBA would restore the confidence of U.S. citizens and sovereign debtholders, eliminate the risk of high interest rates or inflation, and reduce payments on the interest for the national debt, allowing those funds to be spent elsewhere.⁷¹

Another often-used argument holds that future generations have the right to be free of debts imposed on them by preceding generations. By way of illustration, they point out that each person in the United States is "on the hook" for over \$50,000.⁷² It is here that the argument focuses specifically on an Article V convention. Proponents contend that Congress and the President have had the opportunity to act to resolve this issue, and have not done so. For this reason, advocates claim, it is up to the people to amend the Constitution to compel the Federal government to balance the budget.⁷³

Other arguments advanced by proponents of a BBA include comparisons to household finances or other countries. Indeed, many countries have some sort of balanced budget requirement. Some of these are statutory while others are constitutional. The premise of these arguments is that if other nations, or ordinary people, can balance their finances and not spend more than they take in, then the Federal government should be able to do the same. Opponents of a BBA counter that many people take on debt to finance projects, because of tough financial times, or to purchase expensive property like cars and houses. Opponents also note that many countries do balance their budget, but this balancing occurs over an entire business cycle rather than over a single fiscal year.⁷⁴

Opponents of the various BBA proposals have raised several concerns with the various provisions suggested and their potential impact on the U.S. economy. Many opponents, however, take issue with certain threshold matters, namely those pertaining to the enforcement of a BBA and involvement by the judiciary.⁷⁵ While failure to comply with the amendment's requirements could entail political risks, it remains to be seen how a BBA would be enforced against a branch of the government that refused to comply with it. Involving the judiciary would implicate complex and difficult-to-predict issues of standing and justiciability. A related issue that some opponents raise is the possibility that Congress would likely be able to circumvent a BBA's requirements. Specifically, Congress could use implementing legislation to create loopholes that would evade the requirements. For instance, Congress could set up different

⁶⁹ "Debts, Deficits, and the Balanced Budget Act", Presented by the Balanced Budget Amendment Task Force: <http://www.bba4usa.org/article-v-resources.html>.

⁷⁰ See n. 68, at 5.

⁷¹ See n. 69.

⁷² Scott Rogers, Letter to Michigan Legislature, Balanced Budget Amendment Task Force, 10-10-2013

⁷³ See n. 69.

⁷⁴ See generally, Chye-Ching Huang & Krista Ruffini, "Proposed Balanced Budget Amendment Is Extreme by International Standards", Center on Budget and Policy Priorities, 5-3-2013.

⁷⁵ See n. 46, at 10-11.

financing schemes to avoid the BBA, treat programs off-budget, shift regulatory costs to businesses and individuals, or allow government-sponsored enterprises to administer more of the government's functions.⁷⁶

For opponents, there are many concerns over the effect of a BBA on Congress's ability to react to national emergencies or invest in large infrastructure programs. This concern is especially strong in light of proposed requirements for a supermajority vote to waive the BBA's provisions. Supermajorities can be difficult to attain and much time is required to build the political consensus necessary to achieve a supermajority. This is a concern particularly in situations in which time could be of the essence. Another issue is that a supermajority waiver provision could grant individual or small groups of legislators an undue amount of power to extract major concessions in emergency situations.⁷⁷ Other detractors express doubt that a BBA would benefit the economy. In fact, some economists claim that a BBA would require Congress to raise taxes or cut spending at an inappropriate time to the point that it could worsen a suffering economy.⁷⁸ Depending on the provisions adopted, a BBA could create problems for a number of government programs that draw down reserves to pay claims made against the programs' funds, according to BBA opponents. This means that Social Security and civil service retirement programs would be unable to pay benefits.⁷⁹ Likewise, the Federal Deposit Insurance Corporation would be unable to function in the event of a bank failure, even if it had plenty of funds on hand.

Finally, some feel that the current level of national debt is either not a problem, or is a problem that should not be resolved with a constitutional amendment. Those arguing the former contend that national debt is only an issue if interest payments create a substantial drag on the economy.⁸⁰ Debt, they argue, is useful to leverage funds now to maintain and improve infrastructure and to act in a countercyclical fashion with economic booms and busts to ensure that the economy does not collapse. Some economists who agree with this idea argue that the government has not yet done enough to stimulate the economy, and that more spending (and more debt) is required.⁸¹ Other detractors are concerned with the growth of national debt, but contend that the weaknesses of BBA outweigh its strengths. Those who hold this view argue that legislative and political action has been the cause of the nation's debt and would be a more useful and less destructive solution than the BBA would be.⁸²

CONCLUSION

While a BBA could be a powerful tool in restraining the Federal government from taxing and spending, it also could pose serious risk to established entitlement programs and current budget methodology. Especially at risk are Social Security and similar trust fund programs that are funded to pay down obligations in the future. To some, the supermajority provisions are

⁷⁶ See n. 46, at 12.

⁷⁷ See n. 60, at 5.

⁷⁸ *Id.* at 1.

⁷⁹ *Id.* at 2, 6-7.

⁸⁰ Paul Krugman, "Nobody Understands Debt", *The New York Times*, 1-1-2012, retrieved 7-22-2014 at: http://www.nytimes.com/2012/01/02/opinion/krugman-nobody-understands-debt.html?_r=0.

⁸¹ *Id.*

⁸² U.S. House, Committee on the Judiciary, *Balanced Budget Amendment Report together with Dissenting Views and Additional Dissenting Views*. (112 H. Rpt. 117), 28-40.

appealing as a method to control spending, impart fiscal discipline, and require the political branches to make difficult decisions regarding national policy. It is likely, however, that such provisions also could be used to gain political advantage and ultimately serve to insulate good and bad policies alike. Furthermore, there is potential that Congress could craft legislation that would render any BBA functionally ineffective, or reroute government spending through other channels. Because of these risks, there is likely to be considerable difficulty in moving a BBA through the amendment process. It is clear that any BBA would have to be precise in its language regarding the topics discussed above to avoid the difficulties that could appear after its adoption.